92-1195

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALICIA C. MORRIS,
Petitioner,
v.
STATE OF TEXAS,
Respondent

Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE STATUTE IN QUESTION SO VAGUE, UNCERTAIN, AMBIGUOUS, OR CONFUSING, ON IT'S FACE AND AS APPLIED, THAT THE DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW IN VIOLATION OF HER RIGHTS UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION MADE APPLICABLE TO THE STATES OF THE UNION THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II.

WHETHER THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF STATE AND FEDERAL LAW IN CONFLICT WITH AN APPLICABLE DECISION OF THE SUPREME COURT OF THE UNITED STATES.

III.

WHETHER THE STATE COURT OF APPEALS MISCONSTRUED THE STATUTE IN RULING THAT THE PLACES A PERSON IS REQUIRED TO REPORT UNDER TEXAS FAMILY CODE SECTION 34.02 ARE NOT NECESSARY ELEMENTS OF THE OFFENSE AS SET OUT IN ARTICLE 34.01 TEXAS FAMILY CODE.

PARTIES TO THE PROCEEDING

The parties to the proceeding are **ALICIA C. MORRIS** as set out in the caption (appellant in No. C14-91-444-CR).

-AND-

The State of Texas, Appellee

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALICIA C. MORRIS
Petitioner,

v.

STATE OF TEXAS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

ALICIA C. MORRIS, respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered July 11, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas was ordered published. The decision affirmed the judgment of the County Criminal Court 14 of Harris County, Texas. The Opinion of the Court of Appeals is reprinted as Appendix A; the order

of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas denying Appellant's motion for Rehearing is reprinted as Appendix B; the order of the Court of Criminal Appeals denying Appellants Petition for Discretionary Review is reprinted as Appendix C.

STATEMENT OF JURISDICTION OF THE COURT

The Judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas was rendered on June 11, 1992, and a timely Petition of Rehearing was denied July 16, 1992 (App. D). Appellant's Petition for Discretionary Review was refused by the Court of Appeals on October 14, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved in this proceeding are reproduced verbatim in the Appendix hereto. (Page 4a to Page 7a)

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SECTION 34.01
SECTION 34.02
SECTION 34.07

CALIFORNIA PENAL CODE

SECTION 11166 (A)

STATEMENT OF THE CASE

A. SUMMARY OF FACTS

In October of 1990, Anita Brown and Virginia Blade were employed as Teacher's Aides for the severely and profoundly mentally retarded children at Reynolds Elementary School. They carried the child victim, **JERRY CONNER**, from their department to a washroom located in the rear of but separate from **ALICIA C. MORRIS'** classroom where she taught pre-kindergarten children.

The two aides had already decided among themselves to teach **JERRY CONNER** to stop eating his feces by placing his hand under hot running water.

They entered the classroom of **ALICIA MORRIS** unannounced. At that time, **ALICIA MORRIS** and Willie Faye Nelson were eating their lunch and watching TV in a darkened classroom during their off-period. One of the aides, Virginia Blade, claims to have announced they were going to teach Jerry from eating his feces. This testimony was disputed by **ALICIA MORRIS** and Anita Brown.

At any rate, after scalding the child in the washroom, Virginia Blade and Anita Brown exited the washroom, passing through the classroom of Ms. Morris.

The only other time, **ALICIA C. MORRIS** had an opportunity to see **JERRY CONNER** was about 40 minutes later when she stood at her class-room door to receive her next class of students. She had a brief glimpse as he was being carried from the school by an employee of Thomas Care Center.

B. PROCEEDINGS BELOW

On April 16th, 1991, in County Criminal Court #14, Harris County, Texas, Appellant was adjudged guilty, (though the information did not so charge, nor did the evidence prove, not did the court so instruct), of the offense of knowingly failing to make an oral report within forty-eight (48) hours and a written report within five (5) days after first suspecting child abuse or neglect, to: (1) any local or state law enforcement agency; (2) the Texas Department of Human Resources; (3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred; or (4) the agency designated by the court to be responsible for the protection of children; that she had cause to believe that a child had been abused or [sic *and*] neglected. The federal question was raised in the Trial Court by a Motion To Quash Information, and Memorandum of Law in support thereof (denied April 10, 1991). [Appendix I.] and by a Motion for Instructed Verdict Based Upon Failure to Charge All Elements of the Offense. {Appendix K.] After a jury verdict of guilty the Court imposed a fine of $1,000.00, 80 hours of community service, costs of court and 120 days in jail. The jail time was probated for one year.

Appeal was taken to the 14th Court of Appeals and on June 11, 1992, the Appellate Court affirmed the judgement of the Trial Court.

A Motion for Rehearing was timely filed which was denied by the Court of Appeals on July 16, 1992.

Appellant's Petition for Discretionary Review was refused on October 14, 1992.

REASONS FOR GRANTING THE WRIT

PART I - A
ARGUMENTS AND AUTHORITIES:

THIS COURT SHOULD DECIDE WHETHER THIS PENAL STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

The Statutes (Sections 34.07 and 34.02 of the Texas Family Code) under which appellant has been found guilty of the offense of failing to report her belief that a child had been abused or neglected is unconstitutional on its face and as applied. It violates both the United States Constitution and the Constitution of the State of Texas. No person should be held to answer for a criminal offense pursuant to a statute which is vague, uncertain, ambiguous or confusing. Life, liberty and property could not be taken by virtue of a statute, whose terms were so vague and uncertain that on cannot determine their meaning, *Lanzetta v. New Jersey*, (reversing a conviction under a statute making it a penal offense to be a gangster; 306 U.S. 451 (1939). The Texas Constitution provided that no citizen of the State may be deprived of life, liberty or property without due course of law. "Due Course of Law" has been interpreted by the Texas Courts as synonymous with "due process of law," *Mellinger v.*

Houston, 3.S.W. 249. This right has its foundation in the Sixth Amendment and the Due Process clause of the Fifth Amendment to the United State Constitution made applicable to the states of the Union through the Due Process clause of the Fourteenth Amendment to the United States Constitution.

Appellant's claim of vagueness, uncertainty, and the confusing nature of the statutes rest upon the following reasons:

First the statute seeks, uncharacteristically, to make criminal and punish one for having beliefs, suspicions or opinions without defining any quantum of acceptable standardized indicia from which it can be ascertained when and how such beliefs, suspicions or opinions may arise.

Second, the statute, further, uncharacteristically, makes criminal and punishes one for failing to act; that is, failing to report the suspicion of child abuse or neglect to certain governmental entities as designated by the statute.

Third, the statute permits Arbitrary and Discriminatory Enforcement by police.

Under this statute, the "belief" or "suspicion" may arise from the none-participatory, non-conduct of the accused, and, as a result, judges, juries and prosecutors alike are left to speculate what external acts, not committed in the presence or eyesight or hearing of the accused, support a finding that the accused *must have* had cause to believe that a child has been abused or neglected.

First it would seem that the Lower Court, as well as the State in its brief believe that this offense may be designated, in the alternative, either as "failure to report child abuse" (page 1, page 4, and page 7 of the Courts

opinion), or, "the offense of failing to report her belief that a child had been abused . . . " (page 2 of the Courts opinion). Appendix *A*

As articulated, these are different aspects of inaction or omission, and the legislature has chosen to make only failing to report a *belief* of child abuse a criminal offense. It also makes a significant constitutional difference to approach this offense with the words as promulgated by the state legislature. Only if this difference is appreciated and recognized can it be decided whether such a failure to act is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Briggs v. State*, 740 S.W. 2d 803.

There is no intelligible standard arising from the statutory language determining where a defendant has cause to believe that a child has been abused.

A California Statute, more narrowly drawn than the Texas Statute, applies to a specified category of persons who reasonably suspect that a child had been the victim of abuse. "Reasonable Suspicion" is clearly defined within that statute. Quoting from that statute, we find the following language:

"For the purpose of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse." **CAL. PENAL CODE, SECT. 11166(a).** Appendix *D*

In contrast, the Texas Statute fails to define the phrase "Having Cause To Believe". That failure is the root cause of it's vagueness.

The case of *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), cited in the Appellate Court's opinion, is strong authority for appellant's position here. A statute is unconstitutionally vague under the *Coates* ruling "because it subjects the right of assembly to an unascertainable standard. It can be said with equal force that the statute in the case at hand is equally unconstitutionally vague because it subjects **ALICIA MORRIS**, defendant here, in the exercise of her right as a professional teacher of small children to an unascertainable standard. Further, in *Coates*, it is said, "[c]onduct that annoys some people does not annoy other . . . [n]o standard conduct is specified at all: . . . men of common intelligence must guess at its meaning."

External facts which raise suspicions (cause to believe) in some, raise no suspicions in others. Failure to report that one has cause to believe that a child has been abused is equally as unconstitutionally vague as the city ordinance condemned in *Coates, Supra*, proscribing the assembling of three or more persons which might be annoying to others.

On page 4 the Court writes, "A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cotton v. State*, 686 S.W.2d 140 (Tex. Crim. App. 1985)

The framers of this legislation did not themselves understand, or express any standard of conduct or criteria for determining whether a person had "Cause to Believe." An examination of Section 34.02 (a), which is directory in nature, states that reports reflecting the reporters ***belief*** - - - shall be made ---- yet, in Section 34.02 (d) we find these confusing words "An oral report shall be made immediately

on *Learning* of the abuse or neglect ---." Within that very same paragraph, we find these words "the professional shall make an oral report ---- not later that 48th hour after the hour the professional first *suspects* that the child has been ---- abused."

In a like manner, this identical, confusing jargon is repeated by the Trial Court in it's charge to the jury (page 1 of the charge) Appendix G. This complained-of statute can be properly described as a paragon of ambiguity.

A Defendant, of necessity, must guess as to the meaning of the conduct required of him in a statute which requires a report when one has a *Belief* of abuse, or when one *Learns* of abuse or when one *Suspects* abuse.

Again in *Coates, Supra*, the U.S. Supreme Court commenting upon the State Court's construction of the Statute as not dependent upon each complainant's sensitivity, "[b]ut the Court did not indicate upon whose sensitivity a violation does depend - the sensitivity of the judge or jury, the sensitivity of the arresting officers, or the sensitivity of a hypothetical reasonable man."

PART I - B
ARBITRARY AND DISCRIMINATORY ENFORCEMENT BY POLICE

And finally, due process is denied where inherently vague statutory language permits selective or discretionary law enforcement. This statute, as written, permits arbitrary and discriminatory enforcement. This fact is uncontradicted in the record. Defendants Morris and Willie Faye Nelson

were arbitrarily selected for prosecution in a situation where school personnel who owed a greater duty to safeguard the welfare of **JERRY CONNER**, and also "Had Greater Cause To Believe:, were absolved from prosecution.

The record reflects, that both the Home Room Teacher and the school nurse had a close-up view of the injured child. Appendix *H* (SF Page 662 Lines 17-25) (SF Page 663 Lines 1) (Testimony of Anita Brown)

The homeroom teacher, Mrs. Chimes, saw the injury to the child, and that he had been scalded, but she made no report. Appendix *H* (SF Page 634 Lines 9 - 22)

The child was injured on October 4, 1990 around noon. Appendix *H* (SF page 528 Lines 16-22). On that same day, the principal called C.P.S. (Child Protective Services). Appendix *H* (SF Page 530 - Lines 20 - 25) Thus, the proper authorities were alerted to a case of possible child abuse, and an investigation was thereby initiated. Officer Kathy Elster knew the incident had been reported to the Houston Police Department on October 5, 1990, the day after it happened. See the testimony of Officer Elster at Appendix *H* (SF page 588 Lines 7-11.

On October 15, 1990 (*ELEVEN DAYS* after the injury and the report of the probable abuse by the school principal), Police Officer Kathy Elster filed a probable cause affidavit which triggered the filing of a criminal information against **ALICIA C. MORRIS**. APPENDIX *E*

The filing of charges in this case against **ALICIA C. MORRIS**, was the direct result of an arbitrary and certainly unnecessary act of police officer, Kathy Elster.

No rational nor useful purpose was served by the belated filing of criminal charges against Appellant. The probability of abuse had already been timely reported by the principal, Mr. McZeal, and the investigation was well underway, when Appellant was filed on *Eleven Days* after the injury.

In *Cotton v. State*, 686 SW 2nd at page 143, the Court wrote "a criminal statute must itself be precisely drawn so that it eliminates the risk of capricious application rather than fosters it as the present statute does". A statute is "void for vagueness if it encourages arbitrary and erratic arrests and convictions."

To further buttress this argument, consider the reasoning to be found in *Dominquez v. Kelley* 786 SW 2 752, wherein that the Court states "The purpose of the reporting is to foster protection for abused children and not to cause penalty to others."

This scenario demonstrates arbitrary, capricious, enforcement of the statute.

Under the facts of this specific case and the applicable law, simple justice calls for nothing less than a finding that the statute in question is unconstitutional as *applied* in this case.

PART II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE AND FEDERAL LAW IN CONFLICT WITH AN APPLICABLE DECISION OF THE SUPREME COURT OF THE UNITED STATES

The Appellate Court further erred in interpreting the *Coates* holding in relation to imprecision as vagueness as well as first amendment rights.

The Appellate Court, states that "[w]here no first amendment rights are involved, this Court need only scrutinize the statute to determine if it is impermissibily vague as applied to the challenging party's specific conduct." This interpretation of the constitution is erroneous because it leads to the conclusion that the due process standard of vagueness, as in the case at bar, is irrelevant to the contention of facial vagueness. Indeed, the first portion of the *Coates* opinion deals exclusively with facial vagueness under the due process clause. The U.S. Supreme Court says in *Coates* that "appellant's position [is] that the ordinance on its face violated the first and fourteenth amendments of the constitution." Further, as to the ordinance there under consideration in *Coates*, the Court says "no standard of conduct is specified at all." Here the Court is speaking of the due process clause of the fourteenth amendment only. (See also headnote to *Coates* case appearing in 402 U.S. 611.

The U.S. Supreme Court in *Coates* holds that the ordinance under consideration is both violative "of the due process standard of vagueness," ". . . as well as the constitutional right of free assembly and association." Thus it must be concluded, that this Court must examine this

statute to determine if, in conformity with appellant's contention, the statute is void for vagueness in violation of the due process clause of the fourteenth amendment. So, where no first amendment rights are involved the mandate of *Coates* is that this Court must examine the statute to determine whether *no* standard of conduct is specified at all in violation of the fourteenth amendment.

The Appellate Court also erred in its interpretation of that part of the U.S. Supreme Court's decision in *Coates* dealing with statutes which this Court seems to determine to be imprecise rather than vague. From a bottom line definitional standpoint, the two words are identical, synonymous. What the Supreme Court has said is: "Thus the ordinance is vague not in the sense that it requires a person to conform his conduct to an *imprecise but comprehensible normative standard*, but rather in the sense that no standard of conduct is specified at all."

PART III.

THE COURT OF APPEALS MISCONSTRUED THE STATUTE BY HOLDING THE DESIGNATED AGENCIES FOR REPORTING ARE NOT ELEMENTS OF THE OFFENSE

The Appellate Court erred in ruling that the places a person is required to report under Section 34.02 are not elements of the offense for which the Appellant was convicted.

On page 4 of The Court's Opinion, (second paragraph) the Court writes as follows:

"Section 34.02 sets out in detail the *required* contents of the *mandatory* report, and designates to whom the report shall be made. It is a misdemeanor offense for a person to knowingly fail to make such report. **TEX. FAM. CODE ANN.** S. 34.07 (Vernon 1986). These Statutes give a person of ordinary intelligence fair notice that he is *required* to file a report with the appropriate agencies when he has cause to believe that a child is being abused." [Emphasis Added]

However on page 7, the Appellate Court reversed its position and writes, "the places to which a person *may* report under that Section (34.02) of the Statute are not elements of the offense for which Appellant was tried and convicted, Appellant was charged under Section 34.07."

The ruling appears clearly contradictory; we would ask the Supreme Court to reverse the ruling in this case. The Appellate Court states in its opinion (page 7) "Appellant was charged under Section 34.07, which makes it a misdemeanor offense for failing to report Child Abuse". That Court has cited only a portion of 34.07 and excised that portion of 34.07 which specifies that it is an offense if the person (1) has cause to believe that a child has been ------- abused; And (2) knowingly fails to report in accordance with Section 34.02 of The Code.

Appellant believes that Section 34.07 and 34.02 must be read together to make up the elements of the offense. Please note that Appellate Court substitutes the words "May Report" as opposed to the dictates of 34.02 which clearly states "Shall Report."

CONCLUSION AND PRAYER

WHEREFORE, for the foregoing reasons, the Appellant respectfully prays that this Honorable Court grant its Petition for Writ of Certiorari and proceed to the merits of the issues presented.

Respectfully submitted,

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APPENDIX A

Affirmed and Opinion filed June 11, 1992.

In The
Fourteenth Court of Appeals

NO. C14-91-00444-CR

ALICIA C. MORRIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 11
Harris County, Texas
Trial Court Cause No. 9040405

O P I N I O N

This is an appeal from a conviction for the offense of failure to report child abuse. Appellant pled not guilty. The jury found appellant guilty as charged and the trial court assessed punishment at 120 days confinement, probated for one year and a fine of $1,000.00. Appellant raises five

points of error. We affirm.

In October of 1990, Ms. Virginia Blade and Ms. Anita Brown were employed as teacher's aides for the severely and profoundly mentally retarded children at Reynolds Elementary School. These children had a tendency to get sick often, therefore, if the child defecated on himself more than twice in a day. the school would contact the child's caretaker to come pick up the child. On October 4, 1990, the victim, Jerry Conner, defecated on himself for the second time that day. Ms. Blade and Ms. Brown took Jerry to the handicapped washroom, where they cleaned him up, washed his hair and put fresh clothes on him.

Thereafter, the women took the child to the pre-kindergarten classroom, where appellant taught, in order "to teach him a lesson -- to stop him from eating his feces." Specifically, they were going to put the child's hand under hot water. As the two women and the child entered appellant's classroom, appellant looked up and Ms. Brown told her that "We're going to teach Jerry to stop eating his shit." When they entered the washroom area of appellant's classroom, they turned on the hot water and proceeded to put the child's right hand under it. As soon as they put his hand under the water, Jerry started hollering, "ka hot. ka hot," which the women understood to mean the water was very hot. Appellant, hearing Jerry's screams, told the two women to get something to cover up his mouth, so Jerry would not be heard screaming and hollering. Ms. Blade and Ms. Brown covered Jerry's mouth with a towel and placed his hand back under the hot water. By this tie, Jerry was screaming and hollering, and was in tears. When Jerry's hand started blistering, the women stopped and proceeded to walk back through appellant's classroom. Jerry's hand started to turn white and the entire surface began blistering. As a result of this action, Jerry sustained severe burns.

In her first point of error, appellant contends that the statute under which she was found guilty of the offense of failing to report her belief that a child had been abused or neglected is unconstitutional on its face and as applied. Specifically, appellant asserts that sections 34.01, 34.02, and 34.07 of the Texas Family Code are unconstitutionally vague because they provide no standard by which a person of reasonable intelligence can be guided in his conduct.

> Section 34.01 of the Texas Family Code provides: A person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person shall report in accordance with Section 34.02 of this code.
>
> **Section 34.02** of the Texas Family Code reads in part:
>
> (a) Nonaccusatory reports reflecting the reporter's belief that a child has been or will be abused or neglected .... shall be made to:
>
> (1) any local or state law enforcement agency;
>
> (2) the Texas Department of Human Services:
>
> (3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred; or
>
> (4) the agency designated by the court to be responsible for the protection of children.

Section 34.07 of the Texas Family code reads:

> (a) A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report in accordance with Section 34.02 of this code
>
> (b) An offense under this section is a Class B misdemeanor.

Whenever an attack upon the constitutionality of a statute is presented for determination, we commence with the presumption that such statute is valid and that the legislature has not acted unreasonably or arbitrarily in enacting the statute. *See Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978); *Ex parte Smith*, 441 S.W.2d 544 (Tex Crim. App. 1969). The burden rests upon the individual who challenges the statute to establish its unconstitutionality. *Ex parte Granviel*, 561 S.W.2d at 511. It is the duty of this court to uphold the statute if a reasonable construction of said statute can be ascertained which will render it constitutional and carry out the legislative intent. *Ely v. State*, 582 S.W.2d 416 (Tex App. 1979); *Chemical Bank v. Commercial Inc. Service Co.,Inc.*,662 S.W.2d 802 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.).

A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Cotton v. State*, 686 S.W.2d 140 (Tex. Crim. App. 1985). Where no First Amendment rights are involved, this court need only scrutinize the statute to determine whether it is

impermissibly vague as applied to the challenging party's specific conduct. *Id.* at 483. However, a statute is not vague merely because it is imprecise. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614,91 S.Ct. 1686, 1688, 29 L.Ed.2d (1971); *Briggs v. State*, 740 S.W.2d 803 (Tex. Crim. App. 1987). It is unconstitutionally void for vagueness only when no standard of conduct is obtained at all or when no core of prohibited activity is defined. *Briggs*, 740 S.W.2d at 806.

A person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person shall report in accordance with Section 34.02 of the Texas Family Code. **Tex. Fam. Code Ann. § 34.01** (Vernon Supp. 1992). Section 34.02 sets out in detail the required contents of this mandatory report, and designates to whom the report shall be made. It is a misdemeanor offense for a person to knowingly fail to make such report. **Tex. Fam. Code Ann. § 34.07** (Vernon Supp. 1986). These statutes give a person of ordinary intelligence fair notice that he is required to file a report with the appropriate agencies when he has cause to believe that a child is being abused. Reviewing the facts in the present case, appellant most certainly had "cause to believe" that the child was being subjected to abuse. Appellant's first point of error is overruled.

In her second point of error, appellant argues that the trial court erred in admitting into evidence state's exhibits seventeen, eighteen and nineteen. Exhibits seventeen and eighteen were pictures taken by Dr. Donald Parks, depicting the scalded hand of Jerry Conner. Exhibit nineteen depicted Jerry Conner under Dr. Parks's care at the hospital. Appellant complains that these pictures are not relevant to the offense for which she is charged, and any probative value was substantially outweighed by their prejudicial effect.

A photograph is competent evidence of any subject about which a witness's description is proper. *Barefield v. State*, 784 S.W.2d 38 (Tex. Crim. App. 1989). In other words, if a verbal description of the item is admissible, than a photograph depicting the same is also admissible. *Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986). An attending physician may testify as to the nature, extent, and seriousness of a wound, especially where the fact or seriousness of the injury is an issue central to the case. *See Lutz v. State*, 176 S.W.2d 317, 320 (Tex. Crim. App. 1943).

In the instant case, the main issue was whether appellant had cause to believe that Jerry Conner had been abused. Dr. Parks's testimony as to the seriousness of Jerry's injury was directly relevant to that issue, because it makes more probable the fact that appellant either saw the injury or heard Jerry Conner screaming at the time he was injured. **Tex. R. Crim Evid. 401**. The state's exhibits show the seriousness of Jerry's injury and make it more probable that appellant saw the injury to Jerry's hand and heard him scream in pain as he was scalded. Since Dr. Parks's testimony was admissible and the pictures are relevant to the seriousness of the injury, the photographs were properly admitted. Furthermore, we are unpersuaded by appellant's argument that the probative value of these pictures is substantially outweighed by the prejudicial effect. Appellant's second point of error is overruled.

In her third point of error, appellant contends that the trial court erred in overruling her motion in limine and her trial objections one and two. The evidence appellant attempted to exclude included testimony of any employee of the school where appellant worked, the testimony of any employee of the Thomas Care Center, any medical records of Jerry Conner's injury, and any photographs taken of Jerry's injury unless appellant had an opportunity to view

Jerry's injury at the time the photographs were taken. In the two trial objections, appellant objected to any testimony of David Brown and Dr. Parks unless appellant was present at the time the witness made the observation about which they would testify, or appellant was privy to the knowledge obtained or the observation made by the witnesses.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. **Tex. R. Crim. Evid. 401**. As mentioned in point of error two, the photographs and the testimony concerning Jerry's injury were directly relevant in determining whether appellant had cause to believe that Jerry Conner had been abused. There is no rule that requires appellant to have personal knowledge of the facts to which a witness may testify or be present when certain photographs are taken. Appellant's third point of error is overruled.

In appellant's fourth point of error, she asserts that the jury charge was erroneous because the trial court authorized the jury to return a verdict of guilty on proof less than that required by statute. Appellant refers to section 34.02(a) of the Texas Family Code, which requires that a report reflecting the reporter's belief that a child has been or will be abused or neglected shall be made to: (1) any local or state law enforcement agency; (2) the Texas Department of Human Services; (3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred; or (4) the agency designated by the court to be responsible for the protection of children. The jury charge, in relevant part of its application paragraph, instructs the jury to find appellant guilty if they believe that appellant "failed to report the abuse to the Texas Department of Human Services or any local or state law enforcement

agency." Appellant claims that since the charge fails to instruct the jury as to the third and fourth agencies to which a person may report child abuse, the court failed to charge the jury on all necessary elements of the offense.

The trial court's charge should set out all essential elements of the offense. *Jackson v. State*, 633 S.W.2d 897, 899 (Tex. Crim. App. 1982). Furthermore, the trial court must fully instruct the jury on the law applicable to the case and apply that law to the facts presented. *Jordan v. State*, 782 S.W.2d 524, 525 (Tex. App. --Houston [14th Dist.] 1989, pet.ref'd). The places to which a person may report under that section of the statute are not elements of the offense for which appellant was tried and convicted. Appellant was charged under section 34.07, which makes it a misdemeanor offense for failing to report child abuse. Since it was unnecessary for the state to allege in the information the third and fourth agencies to which a person may report, the trial court did not err in denying appellant's request to include those agencies in the application paragraph of the jury charge. Appellant's fourth point of error is overruled.

In her fifth point of error, appellant claims that the information was defective because it varied from the statute under which sh was charged, and thus did not set forth the offense in plain and intelligible words. After reviewing the information and the relevant statute, the information sufficiently tracked the language of section 34.07, the statute under which appellant was charge, and, as such, alleged all elements that the state was required to prove. Appellant's fifth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed June 11, 1992

Panel consists of Justices Junell, Robertson and Draughn.

Publish - Tex. R. App. P. 90.

APPENDIX B.

ORDER DENYING APPELLANTS MOTION FOR REHEARING

J. CURTISS BROWN
Chief Justice
PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
Justices

MARY JANE SMART
Clerk
HELEN A. CASSIDY
Chief Staff Attorney

Phone
713-655-2800

Fax
713-650-8550

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

July 16, 1992

Hon. Weldon Berry
723 Main Street
Suite 410
Houston, TX 77002

Hon. Karen A. Clark
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-91-00444-CR TRIAL COURT CASE NO. 904,0405

STYLE: Morris, Alicia C.
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

MARY JANE SMART, CLERK

By /s/ Charline Mitchell
Chief Deputy

Judge, County Criminal Court at Law #11
1302 Preston
4th Floor
Houston, TX 77002

Hon. Katherine Tyra
District Clerk, Harris County
Attention: Criminal Division
P.O. Box 4651
Houston, TX 77210

APPENDIX C.

ORDER REFUSING PETITION FOR DISCRETIONARY REVIEW

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 1183-92
STYLE: MORRIS, ALICIA C.

October 14, 1992
COA#: 14-91-00444-CR

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: WELDON H. BERRY
723 MAIN SUITE 410
HOUSTON, TX 77002

APPENDIX D.

STATUTORY PROVISIONS

U.S.C.A. CONSTITUTION AMENDMENT v.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. CONSTITUTION AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. CONSTITUTION AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

TEXAS CONSTITUTION ART. 1, SECT 19

Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

28 U.S.C.A. SECTION 1257(a)

§ 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United State.

TEXAS FAMILY CODE
SECTION 34.01

§ 34.01. PERSONS REQUIRED TO REPORT

A person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person shall

report in accordance with Section 34.02 of this code.

TEXAS FAMILY CODE
SECTION 34.02

§ 34.02. Contents of Report: to Whom Made

(a) Nonaccusatory reports reflecting the reporter's belief that a child has been or will be abused or neglected, or has died of abuse or neglect, has violated the compulsory school attendance laws on three or more occasions, or has, on three or more occasions, been voluntarily absent from his home without the consent of his parent or guardian for a substantial length of time or without the intent to return shall be made to:

(1) any local or state law enforcement agency;
(2) the Texas Department of Human Services;
(3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred; or
(4) the agency designated by the court to be responsible for the protection of children.

(b) All reports must contain the name and address of the child, the name and address of the person responsible for the care of the child, if available, and any other pertinent information.

(c) All reports received by any local or state law enforcement agency that involve a person responsible for a child's care, custody, or welfare shall be referred to the Texas Department of Human Services or to the agency designated by the court to be responsible for the protection of children. The department or designated agency immediately shall notify the appropriate state or local law

enforcement agency of any report it receives, other than from a law enforcement agency, that concerns the suspected abuse or neglect of a child or death of a child from abuse or neglect. If the report relates to a child, in a facility operated, licensed, certified, or registered by a state agency, the department shall also refer the report to the agency for investigation. If the department initiates an investigation and determines that the abuse or neglect does not involve a person responsible for the child's care, custody, or welfare, the department shall refer the report to a law enforcement agency for further investigation.

(d) An oral report shall be made immediately on learning of the abuse or neglect, or likelihood of abuse or neglect, as prescribed in Subsection (a) of this section. If a professional has cause to believe that a child has been or may be abused or neglected, the professional shall make an oral report as prescribed by Subsection (a) of this section not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected. In all instances a written report shall be made within five days to the same agency or department. Anonymous reports, while not encouraged, will be received and acted on as prescribed by Section 34.053 of this code. In this subsection, "professional" means an individual who is licensed or certified by the state, or who is an employee of a facility licensed, certified, or operated by the state, and who in the normal course of official duties, or duties for which a license or certification is required, has direct contact with children. "Professional" includes teachers, nurses, doctors, and day-care employees.

TEXAS FAMILY CODE
SECTION 34.07

§ 34.07 Failure to Report; Penalty

(a) A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report in accordance with Section 34.02 of this code.

(b) An offense under this section is a Class B misdemeanor.

CALIFORNIA PENAL CODE
SECTION 11166 (A)

§ 11166. Duty to report of child care custodian, health practitioner, or agency employee; Commerical film processor; County probation or welfare department; Law enforcement agency

(a) Except as provided in subdivision (b), any child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. A child protective agency shall be notified and a report shall be prepared and sent even if the child has expired, regardless of whether or not the possible abuse was a factor contributing to the death, and even if

suspected child abuse was discovered during an autopsy. For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse. For the purpose of this article, the pregnancy of a minor does not, in and of itself, constitute the basis of reasonable suspicion of sexual abuse.

APPENDIX E.

PROBABLE CAUSE AFFIDAVIT

Affiant, K. H. Elster, is a peace Officer employed with the Houston Police Department. Affiant and her partner were assigned to investigate the case of the scalding of a mentally handicapped juvenile at Reynolds Elementary School on the date alleged above. Affiant met with the complainant who is 12 years old and unable to relate what happened. Affiant has noted that the complainant has a mixed second and third degree burn of the hand. Affiant has verified this in letter form from Hermann Hospital Burn Center.

Affiant has interviewed Willie Nelson who affiant believes to be credible and who has given affiant a written statement in which she states that she is a Teacher's Aide at Reynolds Elementary. She further states that she was with the defendant in the defendant's classroom eating lunch sometime between the hours of 11:15 - 11:45 A.M. She further states that while they were in the room, both she and the defendant Virginia Blade and Anita Brown, who Nelson knows to be Teacher's Aides at the school. Nelson further states that Brown told them that they were going to teach complainant a lesson for eating his feces. They proceeded to take him behind a partition which serves as a bathroom. She further states she and the defendant saw that one of the Aides had a hairbrush in her hand and that they assumed that the complainant was about to be whipped with the hairbrush. Nelson states that neither she nor defendant took any action at that time. Nelson further states that within minutes after the incident described above, she and the defendant saw the complainant being removed from the room back to the care facility where he lives. At that time, Nelson states that she could see that the complainant's hand was red and appeared to be burned. She further states that, at that time, the

defendant stated, "Oh my God, his hand is burned!" Nelson further states that, almost immediately after the complainant was removed from the school, co-defendant Brown came to the classroom where she and the defendant were and asked them not to say anything about the incident. Nelson states that she and the defendant both assured each other that they would not report the incident to anybody.

Affiant has interviewed the co-defendant Brown, who has given a written confession in which she admits that she and co-defendant Blade punished the complainant for eating his feces, by putting his hand under scalding water.

Affiant has verified that Houston Police Department records do not reflect that the defendant ever reported the incident. Further, affiant has confirmed through the Texas Department of Human Services that the defendant is not a reportee of this incident.

Affiant believes that the defendant was in the classroom with Nelson when the complainant was burned and did not report that fact when she first became aware of it. Affiant further believes that defendant did not report the incident at any later time as required by the Texas Family Code, and that defendant agreed with her codefendants to refrain from saying anything about the incident.

/s/ KATHY H. ELSTER
Affiant

Having considered the above statement, which was signed by the Affiant in my presence and under oath, I find that there is probable cause to believe that the Defendant committed the offense as alleged above.

OCTOBER 15, 1990 _____

APPENDIX F.

TRIAL COURT INFORMATION (INDICTMENT)

THE STATE OF TEXAS

VS.

ALICIA C. MORRIS
3311 FLORINDA
HOUSTON, TEXAS

DATE PREPARED: 10-15-90
BY: djb DA NO.: 385
DOB: BF 12-3-54 AGENCY:
HPD O/R NO.: 104636690

MISDEMEANOR CHARGE:
FAILURE TO REPORT CHILD
ABUSE CAUSE NO.: 9040405
HARRIS COUNTY CRIMINAL
COURT AT LAW NO. : 14
TRANS. TO CCCL # 11

RELATED CASES:
VOL 118 PAGE 211 AX GM
ANITA BROWN, VIRGINA
BLADE, INJURY TO A CHILD
BAIL $500
FIRST SETTING DATE TO BE

PRIOR CAUSE NO.: CO. DEF.: 9039964

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant District Attorney of Harris County, Texas in behalf of the State of Texas, and presents in and to the County Criminal Court at Law No. 14 of Harris County, Texas that in Harris County, Texas, **ALICIA C. MORRIS** hereafter styled the Defendant, heretofore on or about October 4, 1990, did then and there unlawfully

intentionally and knowingly having cause to believe that JERRY CONNER'S physical and mental health and welfare has been and may be further adversely affected by abuse and neglect, fail to report the abuse of JERRY CONNER to the TEXAS DEPARTMENT OF HUMAN SERVICES and to any local or state law enforcement agency while JERRY CONNER was a child younger than eighteen years of age.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

_____

ASSISTANT DISTRICT ATTORNEY OF HARRIS
HARRIS COUNTY, TEXAS

APPENDIX G.

JURY CHARGE IN TRIAL COURT

CAUSE NUMBER 9040405

THE STATE OF TEXAS	§	IN THE COUNTY CRIMINAL
V.	§	COURT AT LAW NUMBER 11
ALICIA C. MORRIS	§	OF HARRIS COUNTY, TEXAS

MEMBERS OF THE JURY:

The defendant, ALICIA C. MORRIS, stands charged by information with the offense of failure to report child abuse in Harris County, Texas, on or about the 4th day of October, 1990. To this charge the defendant has pleaded not guilty.

Section 34.01 of the Texas Family Code provides that a person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person shall report in accordance with Section 32.02 of the Family Code.

Section 34.02(a) of the Texas Family Code provides that nonaccusatory reports reflecting the reporter's belief that a child has been or will be abused or neglected, or has died of abuse or neglect, has violated the compulsory school attendance laws on three or more occasions, or has, on three or more occasions been voluntarily absent from his home without the consent of his parent or guardian for a substantial length of time or without the intent to return shall be made to:

(1) any local or state law enforcement agency;

(2) the Texas Department of Human Resources:

(3) the state agency that operates, licenses certifies, or registers the facility in which the alleged abuse or neglect occurred: or

(4) the agency designated by the court to be responsible for the protection of children.

Section 34.02(d) of the Family Code provides that an oral report shall be made immediately on learning of the abuse or neglect, or likelihood of abuse or neglect, as prescribed in Subsection (z) of this section. If a professional has cause to believe that a child has been or may be abused or neglected, the professional shall make an oral report as prescribed by Subsection (a) of this section not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected. In all instances a written report shall be made within five days to the same agency or department. Anonymous reports, while not encouraged, will be received and acted on as prescribed by the Family Code. In this subsection, "professional" means an individual who is licensed or certified by the state, or who is an employee of a facility licensed, certified, or operated by the state, and who in the normal course of official duties, or duties for which a license or certification is required, has direct contact with children. "Professionals" include teachers, nurses, doctors, and day-care employees.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts

knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct if reasonable certain to cause the result.

"Abuse" includes the following acts or omissions by a person responsible for a child's care, custody, or welfare:

(A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(B) causing or permitting the child to be in a situation in which the child sustains mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;

(D) failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;

(E) sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration with a

foreign object, incest, sexual assault, or sodomy inflicted on, shown to, or intentionally practiced in the presence of a child if the child is present only to arouse or gratify the sexual desires of any person;

(F) failure to make a reasonable effort to prevent sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration with a foreign object, incest, sexual assault, or sodomy being inflicted on or shown to a child by another person if the child is present only to arouse or gratify the sexual desires of another person;

(G) compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code; or

(H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film or depiction of the child is obscene (as defined by the Penal Code) or pornographic.

"Neglect" means:

(A) the leaving of a child in a situation where the child would be exposed to a substantial risk of harm, without arranging for necessary care for the child, and a demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the

child; or

(B) the following act or omissions by a person responsible for a child's care, custody, or welfare:

(i) placing the child in or failing to remove the child from a situation that a reasonable person would realize required judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;

(ii) the failure to seek, obtain, or follow through with medical care for the child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child; or

(iii) the failure to provide the child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by the financial inability unless relief services had been offered and refused.

"Person responsible for a child's care, custody, or welfare" means a person who traditionally is responsible for a child's care, custody, or welfare, including:

(A) a parent, guardian, managing or possessory conservator, or foster parent of the child;

(B) a member of the child's family or household as defined by Section 71.01 of this code;

(C) a person with whom the child's parent cohabits;

(D) school personnel or volunteers at the child's school; or

(E) personnel or volunteers at a public or private child-care facility that provides services for the child or at a public or private residential institution or facility where the child resides.

"Child" means a person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes.

Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, ALICIA C. MORRIS, on or about the 4th day of October, 1990, in Harris County, Texas, intentionally or knowingly **after having cause to believe that JERRY CONNER,** hereafter styled the Complainant, a child younger than eighteen years of age, physical or mental health has been or may be further adversely affected by abuse or neglect, failed to **report the abuse to the Texas** Department of Human Services or any local or state law enforcement agency, you will find the defendant guilty.

If you do not so believe or if you have a reasonable doubt thereof you will find the defendant not guilty.

All persons are presumed to be innocent of all crimes, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that an individual has been arrested, confined, or otherwise charged with an offense gives no rise to the inference of guilt at her trial.

Therefore, you will not consider the information, nor the fact that the defendant she has been charged with the offense alleged in the information, nor the fact that he has been arrested or confined, if she has, as any evidence in the case. You will wholly disregard the same and pass upon the guilt or innocence of the defendant solely from the evidence given before you in the trial of the case and the law as given in the Court's charge.

In all criminal cases, the burden of proof is on the State, and this defendant is presumed to be innocent and may not be convicted of the offense with which she is charged until each element of the offense is proved beyond a reasonable doubt. If you have a reasonable doubt as to any one or more of the elements of the case, you must acquit the defendant and say by your verdict "Not Guilty".

In deliberating upon this case, you must not refer to or discuss any matters not in evidence before you. You must not arrive at your verdict by any lot or chance, or by putting down any figures and doing any dividing.

After argument of counsel, you must retire and let your first act be to select one from among your number as your foreperson. When you have reached your verdict, which must be unanimous, you may use one of the forms attached hereto by having the foreperson sign his or her name to the verdict sheet.

Should you desire to communicate with the Court pertaining to this case, such communication must be in writing and be signed by the foreperson and handed to the Bailiff.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given to you, and be governed thereby.

_____

DAVID MENDOZA JR., JUDGE
COUNTY CRIMINAL COURT AT LAW NO. 11
HARRIS COUNTY, TEXAS

APPENDIX H.

STATE OF TEXAS V. ALICIA C. MORRIS STATEMENT OF FACTS - COUNTY CRIMINAL COURT AT LAW #14 HARRIS COUNTY, TEXAS

[SF PAGE 662 LINES 17-25]

Mr. BERRY: Q. Well, who was in the room?

MS. BROWN: A. Ms. Chimes and Ms. Blade were the only people in the room at the time that I was in the room.

MR. BERRY: Q. What action, if any, did you take about the condition of his hand?

MS. BROWN: A. I left the room to go get the Principal and the School Nurse.

MR. BERRY: Q. Who was the School Nurse?

MS. BROWN: A. We had a Substitute Nurse. I think her name was "Ms. Roth".

MR. BERRY: Q. Were you there when the School Nurse had opportunity to look at Jerry's hand?

MS. BROWN: A. Yes, I walked back in with her.

[SF PAGE 634 LINES 9-22]

MR. BERRY: Q. When Mrs. Chimes saw

the injury to little Jerry -- that was on October 4th -- did she thereafter make a report of the injury, or of whatever, or of any kind?

OFFICER ELSTER: A. She's not required to report an injury.

THE COURT: The question is not whether she's required or not. The question is whether she made a report.

MR. BERRY: Now, that's the question?

OFFICER ELSTER: A. Of the injury?

MR. BERRY: Q. Yes?

OFFICER ELSTER: A. No.

MR. BERRY: Q. She didn'?

OFFICER ELSTER: A. No, she did not.

MR. BERRY: Q. Well, she saw the injury, didn't she?

OFFICER ELSTER: A. Yes, she did see the injury.

[SF PAGE 528 LINES 16-22]

MR. BERRY: Q. On October 4th, of 1990, how is that you were made aware that Jerry had been burned?

PRINCIPAL McZEAL: A. I was standing in the lobby directing student traffic and the two Aides walked in and asked -- I was standing alone side the Nurse at the time -- and we were asked to come outside -- that Jerry had an accident, and when I walked up, I saw Jerry in the van being driven away and I had a chance to see his hand.

[SF PAGE 530 LINES 20-25]

MR. BERRY: Q. After seeing his burned hand in the van, what action did you take?

PRINCIPAL McZEAL: A. The day -- the day was ending and I went in and I attempted to call my Supervisor -- my District Superintendent. I was unable to contact him. So, I left and when I got home, I called C.P.S.

MR. BERRY: Q. Which stands for?

PRINCIPAL McZEAL: A. "Child Protective Services".

[SF PAGE 588 LINES 7-11]

PROSECUTOR: Q. All right. And, do you have any idea when the call came in to H.P.D. reporting it?

OFFICER ELSTER: A. Yes, on October 5th, 1990.

MR. BERRY: Q. The day after it happened?

PROSECUTOR: A. Yes, ma'am.

APPENDIX I.
NO. 9040405

THE STATE OF TEXAS	}{	IN THE COUNTY CRIMINAL
	}{	
VS.	}{	COURT AT LAW NUMBER 11
	}{	
ALICIA C. MORRIS	}{	OF HARRIS COUNTY, TEXAS

MOTION TO QUASH INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

ALICIA C. MORRIS, Defendant in the above cause, excepts to and moves the Court to set aside and quash the information herein and dismiss the prosecution based thereon upon the following grounds:

I.

Defendant excepts to and moves the Court to set aside said information upon the grounds that same fails to allege an offense against this Defendant with that degree of certainty that will give this Defendant notice of the particular offense with which she is charged in violation of Art. 21.11 V.A.C.C.P., and fails to inform Defendant of the nature and cause of the accusation against her in violation of Art. 1 Sec. 10 of the Constitution of the State of Texas, and the Sixth Amendment to the Constitution of the United States.

II.

Said information fails to allege an offense with such certainty as will enable the Defendant to plead the Judgment that may be rendered upon it in bar of any prosecution for the same offense in violation of Article 21.04 of the Code of Criminal Procedure of the State of Texas.

III.

Said information fails to set forth an alleged offense in plain and intelligible words in violation of Article 21.02 of the Code of Criminal Procedure of the State of Texas.

IV.

Article 34.01 of the Texas Family Code wholly fails to give persons of common intelligence and this Defendant fair notice that her alleged activity herein was proscribed by said statue and is therefore, unconstitutionally vague in violation of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The statute is void for vagueness.

WHEREFORE, DEFENDANT prays that this exception and motion to set aside and quash the information herein be sustained and the prosecution or prosecutions based thereon dismissed.

Respectfully submitted,

/s/ Weldon H. Berry

WELDON H. BERRY
SBN 02245000
723 MAIN STREET, SUITE 412
HOUSTON, TEXAS 77002
(713) 224-1713
ATTORNEY FOR DEFENDANT,
ALICIA MORRIS

F I L E D
KATHERINE TYRA
District Clerk
3/21/91
Harris County, Texas
By /s/ illegibly
Deputy

RECORDER'S MEMORANDUM:
This instrument is of poor quality and not satisfactory for recordation; and/or alterations were present at the time of filming.

13/RR/995 cef

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Quash Information was hand delivered (wb) to the Assistant District Attorney for Harris County, Texas on this the 20th day of March, 1991.

/s/ Weldon H. Berry
WELDON H. BERRY

ORDER

Motion to quash denied 04/10/91 after a hearing and presentation of this motion in open court.

Signed and entered this
10th day of 1991

David Mendoza Jr.
Judge Presiding
HCCCL # 11

APPENDIX J.

MEMORANDUM OF THE APPLICABLE LAW IN MOTION TO QUASH INDICTMENT INFORMATION

NO. 90-40405

THE STATE OF TEXAS	}{	IN THE COUNTY CRIMINAL
	}{	COURT OF
VS.	}{	HARRIS COUNTY, TEXAS
	}{	
ALICIA MORRIS	}{	NUMBER ELEVEN

MEMORANDUM OF THE APPLICABLE LAW IN MOTION TO QUASH INFORMATION

ACTS OF THE LEGISLATURE, AS WELL AS THE GOVERNING BODIES OF MUNICIPALITIES, MUST CONFORM TO THE CONSTITUTIONAL AND STATUTORY REQUIREMENTS OF PENAL LAW. SUCH ENACTMENTS MUST BE SUFFICIENTLY DEFINITE, CLEAR AND UNAMBIGUOUS THAT THOSE SUBJECT TO THEIR PROVISIONS MAY KNOW WITH REASONABLE CERTAINTY WHAT THEY MEAN, AND WHO IS LIABLE TO PUNISHMENT FOR THEIR INFRACTION.

The Defendant, ALICIA C. MORRIS, is charged in the information pursuant to the provisions of Article 34.01 of the Texas Family Code, as follows:

ALICIA C. MORRIS hereafter styled the Defendant, heretofore on or about October 4, 1990 then and there unlawfully intentionally and knowingly *having cause to believe* that JERRY CONNER'S physical and mental health and welfare had been and may be further adversely affected

by abuse and neglect, fail to report the abuse of JERRY CONNER to the TEXAS DEPARTMENT OF HUMAN SERVICES and to any local or state law enforcement agency while JERRY CONNER was a child younger than eighteen years of age." (EMPHASIS ADDED)

In order not to be violative of due process, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and provide ascertainable and specific standards of guilt to protect against arbitrary, erratic and discriminatory enforcement, (21) especially where the uncertainty adduced by the statute would threaten to inhibit the exercise of constitutionally protected rights.

Stated more specifically, a criminal enactment must be sufficiently explicit, in its description of the acts, conduct, or conditions required or forbidden, so as to prescribe the elements of the offense with reasonable certainty, fix an ascertainable standard of guilt, and make known to those to whom it is addressed what conduct on their part will render them liable for its penalties, and not be so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application.

A statute is void for vagueness if it "fails to give a person or ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." (5)

Vaguely phrased measures run afoul of substantive due process requirements by failing to convey with reasonable certainty the statute's intended sweep. (3)

Although the void-for-vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, the

more important aspect of the doctrine is not actual notice, but the other principal element of the doctrine, the requirement that the legislature establish minimum guidelines to govern law enforcement, (4) and due process is denied where inherently vague statutory language permits selective or discretionary law enforcement. So, the law fails to meet the requirements of due process clause if it so vague and standardless that it leave judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. Also, if the scope of power given officials under a statute is so broad that the exercise of constitutionally protected conduct depends upon the *subjective* views of those officials as to the propriety of such conduct, the statute is unconstitutional as a denial of due process.

Government must not have "unfettered discretion" to prosecute on basis of a statute which is so vague or of such broad applicability that even-handed administration of law is not possible.

The phrase "*Having Cause to Believe*" is undeniably vague. It sets no specific and ascertainable standards of guilt. Men of common intelligence must necessarily guess at its meaning and differ as to its application.

Finally, the statute, as written, permits arbitrary and discriminatory enforcement. This fact has been proved in

that Defendants Morris and Willie Faye Nelson were arbitrarily selected for prosecution in a situation where other school personnel who owed a greater duty to safeguard the welfare of JERRY CONNER, and who also "had greater cause to believe" were absolved from prosecution.

F I L E D
KATHERINE TYRA
District Clerk
APR 10 1991
1:10 P M
Harris County, Texas
By: /s/ illegible

APPENDIX K.

MOTION FOR INSTRUCTED VERDICT

4MORRIS7 13/RR/996C
14/RR/992 cef

NO. 9040405

THE STATE OF TEXAS	}{	IN THE COUNTY CRIMINAL
	}{	COURT OF HARRIS COUNTY,
VS.	}{	TEXAS
	}{	
ALICIA MORRIS	}{	NUMBER ELEVEN

MOTION FOR INSTRUCTED VERDICT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ALICIA C. MORRIS in person and by her attorney of record, WELDON H. BERRY after both the State and the Defense have rested, after the evidence has been closed, and before any charge has been presented to counsel or read or submitted to the jury, and moves the Court to instruct the jury to return a verdict of not guilty upon the following grourds:

The State of Texas has failed to allege and to prove a violation of Section 34.01 of The Texas Family Code.

The Charging allegations of the information are as follows: "that in Harris County, Texas, ALICIA C. MORRIS hereinafter styled the Defendant, heretofore on or about October 4, 1990 then and there unlawfully intentionally and knowingly having cause to believe that JERRY CONNER'S physical and mental health and welfare has been and may be

further adversely affected by abuse and neglect, fail to report the abuse of JERRY CONNER to the TEXAS DEPARTMENT OF HUMAN SERVICES and to any local or state law enforcement agency while JERRY CONNER was a child younger than eighteen years of age."

Section 34.01 of The Texas Family Code provides in pertinent part the following:

34.01. Persons Required to Report

A person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person shall report in accordance with Section 34.02 of this code.

Section 34.02 of The Texas Family Code sets forth to whom the report should be made:

34.02 Contents of Report to Whom Made

(a) Nonaccusatory reports reflecting the reporter's belief that a child has been or will be abused or neglected, or has died of abuse or neglect, has violated the compulsory school attendance laws on three or more occasions, or has, on three or more occasions, been voluntarily absent from his home without the consent of his parent or guardian for a substantial length of time or without the intent to return shall be made to:

(1) any local or state law enforcement agency;

(2) the Texas Department of Human Services;

(3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred; or

(4) the agency designated by the court to be responsible for the protection of children.

In order to charge an offense punishable by law, the content of section 34.01 and section 34.02 must be set forth in the information. The information is silent as to sections 34.02(a) (3) and (4). Failure to report as set forth in sections 34.02 (a) (3) and (4) are required elements of the crime.

The information there fore fails to allege an offense or crime punishable by law. (There is no evidence to support a verdict of guilt.)

WHEREFORE, DEFENDANT, ALICIA C. MORRIS, respectfully moves the Court to grant the foregoing motion and return an instructed verdict of "Not Guilty."

Respectfully submitted,

/s/ ALICIA C. MORRIS
ALICIA C. MORRIS
DEFENDANT

/s/ WELDON H. BERRY
WELDON H. BERRY
ATTORNEY AT LAW
SBN 02245000
HOUSTON, TEXAS 77002
(713) 224-1731

ORDER

On this the 16th day of April 1981, the above and foregoing Motion for Instructed Verdict is GRANTED/DENIED.

/s/ illegible
JUDGE PRESIDING